

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:F:MAN:2:POSTF-109340-02

VATaverna

date: 3/13/2002

to:

LMSB Employment Tax National Program Manager
Attn: [REDACTED], Team Manager, Group [REDACTED]

from: Area Counsel, LMSB (Financial Services)

subject:

[REDACTED] Inc. & Subsidiaries
Forms SS-10 Tax Years [REDACTED] and [REDACTED]
[REDACTED], Inc.
Forms SS-10 Tax Years [REDACTED] and [REDACTED]
[REDACTED] Inc.
Forms SS-10 Tax Years [REDACTED] and [REDACTED]

Consent to Extend the Statute of Limitations on Assessment
Statute of Limitations Expires: [REDACTED]

UIL Nos. 6501.08-00, 6501.08-09, 6501.08-17

We write in response to your request of February 11, 2002 for advice in the above-captioned matter. This memorandum should not be cited as precedent. Specifically you have requested that we provide you with advice on the appropriate language to use on Forms SS-10 (Consents to Extend the Time to Assess Employment Taxes) to extend the statute of limitations on assessment of the employment taxes of [REDACTED] Inc. and Subsidiaries for the taxable years [REDACTED] and [REDACTED]; [REDACTED] Inc. for the taxable years [REDACTED] and [REDACTED]; and [REDACTED] Inc. for the taxable years [REDACTED] and [REDACTED].

This opinion is based on the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon.

You should be aware that, under routing procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately 10 days. In

the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

Issue

1. Which entity is the proper entity to execute Forms SS-10 for the [REDACTED] and [REDACTED] taxable years?

2. What specific language should be used on the Forms SS-10, Consent to Extend the Statute of Limitations on Assessment of the employment tax liabilities of [REDACTED] Inc. and Subsidiaries, [REDACTED] Inc., and [REDACTED] Inc. for the taxable years [REDACTED] and [REDACTED]?

Conclusion

Issue 1

[REDACTED], Inc. may execute Forms SS-10 for the [REDACTED] and [REDACTED] taxable years for its own employment tax liabilities. [REDACTED] Inc. may execute a Form SS-10 for the [REDACTED] taxable year of [REDACTED] Inc. as common paymaster. [REDACTED] Inc. may execute a Form SS-10 for the [REDACTED] taxable year of [REDACTED] Inc. as common paymaster.

[REDACTED], Inc. may execute Forms SS-10 for the [REDACTED] and [REDACTED] taxable years for its own employment tax liabilities.

[REDACTED], Inc. may execute Forms SS-10 for the [REDACTED] and [REDACTED] taxable years for its own employment tax liabilities.

Issue 2

[REDACTED] Inc.

The captions for the Forms SS-10 for the taxable years [REDACTED] and [REDACTED] should read as follows:

"[REDACTED] Inc. (EIN: [REDACTED])."

The EIN of [REDACTED], Inc. should be entered in the upper right hand corner of the Form SS-10.

[REDACTED] Inc.

The caption for the Form SS-10 for the taxable year [REDACTED] should read as follows:

"[REDACTED] Inc. (EIN: [REDACTED])."

The EIN of [REDACTED], Inc. should be entered in the upper right hand corner of the Form SS-10.

We advise that two Forms SS-10 be executed for the [REDACTED] taxable year. The captions for the Forms SS-10 for the taxable year [REDACTED] should read as follows:

1. "[REDACTED] Inc. (EIN: [REDACTED]) ."

The EIN of [REDACTED], Inc. should be entered in the upper right hand corner of the Form SS-10.

2. "[REDACTED] Inc. (EIN: [REDACTED]), common paymaster for [REDACTED] Inc. (EIN: [REDACTED]) *."

In addition, at the bottom of the page, the following language should be added:

"*This consent is applicable for all returns filed for the quarter beginning April 1, [REDACTED]."

The EIN of [REDACTED], Inc. should be entered in the upper right hand corner of the Form SS-10.

[REDACTED]

We advise that two Forms SS-10 be executed for the [REDACTED] and [REDACTED] taxable years. The captions for the Forms SS-10 should read as follows:

1. "[REDACTED] Inc. (EIN: [REDACTED]) ."

The EIN of [REDACTED], Inc. should be entered in the upper right hand corner of the Form SS-10.

2. "[REDACTED] Inc. (EIN: [REDACTED]), common paymaster for [REDACTED] Inc. (EIN: [REDACTED]) *"

In addition, at the bottom of the page, the following language should be added:

"*This consent is applicable for all returns filed for the quarter beginning October 1, [REDACTED]."

The EIN of [REDACTED], Inc. should be entered in the upper right hand corner of the Form SS-10.

Facts

For the taxable years [REDACTED] and [REDACTED] [REDACTED] Inc. ("[REDACTED]") (EIN: [REDACTED]), a Delaware corporation, was the common parent of an affiliated group of corporations, including [REDACTED], Inc. ("[REDACTED]") (EIN: [REDACTED]) and [REDACTED], Inc. ("[REDACTED]") (EIN: [REDACTED]). You are presently conducting an employment tax examination of [REDACTED], [REDACTED] and [REDACTED] for the [REDACTED] and [REDACTED] taxable years.

[REDACTED] Inc. ("[REDACTED]") is a Delaware corporation. [REDACTED] is a wholly-owned subsidiary of [REDACTED]. On [REDACTED], [REDACTED] and [REDACTED] entered into an Agreement and Plan of Merger ("Agreement"). As a result of the Agreement, [REDACTED] merged with and into [REDACTED]. [REDACTED] was the surviving corporation and [REDACTED] which was created solely for the purpose of acquiring [REDACTED] ceased to exist. Accordingly, [REDACTED] became a wholly-owned subsidiary of [REDACTED].

[REDACTED] filed its Forms 941 (Employer's Quarterly Federal Tax Return) through the quarter ended September [REDACTED]. [REDACTED] filed its Forms 941 through the quarter ended March [REDACTED]. [REDACTED] filed Forms 941 through the quarter ended December [REDACTED]. For the quarters beginning in October [REDACTED], [REDACTED] claims to be the "common paymaster" for [REDACTED] and allegedly reported [REDACTED]'s employment tax liabilities on its Forms 941 for the quarters beginning in October [REDACTED].¹ For the quarters beginning in April [REDACTED], [REDACTED] claims to be the "common paymaster" for [REDACTED] and allegedly reported [REDACTED]'s employment tax liabilities on its Forms 941 for the quarters beginning in April [REDACTED]. The Forms 941 reflect [REDACTED]'s name and EIN number, but do not reflect either [REDACTED] or [REDACTED]'s name and EIN number. The Forms 941 do not report either [REDACTED] or [REDACTED]'s tax liabilities separate from [REDACTED]'s liabilities.

¹The common paymaster provisions apply only with respect to employees who are concurrently employed by two or more related corporations. In the event that some employees were employed only by [REDACTED] or [REDACTED], and [REDACTED] was responsible for disbursing wages to those individuals, [REDACTED] would merely be a payroll agent for [REDACTED] and [REDACTED] and would not qualify as the common paymaster with respect to individuals who were not concurrently employed.

DiscussionIssue 1

I.R.C. § 3121 and the regulations thereunder, define a common paymaster. A common paymaster is responsible to 1. compensate an employee where two or more related corporations concurrently employ the same individual; 2. remit taxes pursuant to I.R.C. §§ 3102 and 3111 with respect to the remuneration it disburses as the common paymaster; and 3. file information and tax returns and issue Forms W-2 with respect to wages it is considered to have paid under this section. Treas. Reg. § 31.3121(s)-1(a). The common paymaster computes these taxes as though it were the sole employer of the concurrently employed individuals. If the common paymaster fails to remit these taxes (in whole or in part), it remains liable for the full amount of the unpaid portion of these taxes. In addition, each of the other related corporations using the common paymaster is jointly and severally liable for its appropriate share of these taxes. Treas. Reg. § 31.3121(s)-1(c)(1).

According to the information you have provided us, it is our understanding that you have not yet determined whether, pursuant to I.R.C. § 3121 and the regulations thereunder, [REDACTED], Inc. qualifies as the common paymaster for [REDACTED] and [REDACTED]. If you determine that [REDACTED] did not qualify as a common paymaster, [REDACTED] was not authorized to file Forms 941 reporting [REDACTED] and [REDACTED]'s employment tax liabilities. Accordingly, no return was filed. In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). If no return is filed, the tax may be assessed at any time.

There is no caselaw or statutory authority addressing the filing of Forms 941 by a common paymaster in the manner that [REDACTED] filed the Forms 941. Likewise, there is no published guidance. However, it is our understanding that Forms 941 are commonly filed in this manner, and have a long history of being so filed. Accordingly, we advise that the Forms 941 be treated as valid returns of [REDACTED] and [REDACTED] for purposes of addressing the statute of limitations. Since a return was filed, I.R.C. § 6501(a) applies.

Forms 941 are filed on a quarterly basis. I.R.C. § 6501(b)(2) provides that employment tax returns filed before April 15 of the year following the year to which the taxes relate are deemed to have been filed on April 15. Accordingly, all of the returns filed within the calendar year are deemed filed on

April 15 of the following year for purposes of determining the statute of limitations on assessment.

Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For employment taxes, the form used by the Service to extend the limitations period on assessment is Form SS-10 (Consent to Extend the Time to Assess Employment Taxes).

The regulations under section 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service will generally apply the rules applicable to execution of the original returns to consents to the extension of time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. Treas. Reg. § 31.6061-1 sets forth the employment tax return signing rules. Treas. Reg. § 31.6061-1 states that:

Each return required under the regulations in this subpart shall, if signature is called for by the form or instructions relating to the return, be signed by . . . the president, vice president, or other principal officer, if the person required to make the return is a corporation. . . The return may be signed for the taxpayer by an agent who is duly authorized in accordance with §§ 31.6011(a)-7 to make such return.

Since the common paymaster is responsible for filing returns on behalf of the related corporation, the common paymaster may execute the consent on behalf of the related corporation. Accordingly, [REDACTED] may execute a consent extending the statute of limitations on the assessment of [REDACTED] and [REDACTED]'s employment tax liabilities for the quarters [REDACTED] acted as the common paymaster.

Moreover, since each related corporation using the common paymaster is jointly and severally liable for its appropriate share of employment taxes if the common paymaster fails to remit these taxes (in whole or in part), each corporation may, therefore, enter into its own consent to extend the statute of limitations with respect to its employment tax liabilities. Additionally, the related corporation may enter into its own Form SS-10 based upon the agency relationship it shares with the common paymaster. The common paymaster is the related

corporation's agent for the payment of employment taxes and the filing of returns. The principal is still permitted to act on its own behalf. In this case, [REDACTED] acted as [REDACTED] and [REDACTED]'s agent. Therefore, [REDACTED] and [REDACTED] as the principals, may enter into their own consent to extend the statute of limitations.

Issue 2

[REDACTED] Inc.

The captions for the Forms SS-10 for the taxable years [REDACTED] and [REDACTED] should read as follows:

"[REDACTED] Inc. (EIN: [REDACTED])."

The EIN of [REDACTED] Inc. should be entered in the upper right hand corner of the Form SS-10.

[REDACTED] Inc.

The caption for the Form SS-10 for the taxable year [REDACTED] should read as follows:

"[REDACTED] Inc. (EIN: [REDACTED])."

The EIN of [REDACTED] Inc. should be entered in the upper right hand corner of the Form SS-10.

We advise that two Forms SS-10 be executed for the [REDACTED] taxable year. The captions for the Forms SS-10 for the taxable year [REDACTED] should read as follows:

1. "[REDACTED] Inc. (EIN: [REDACTED]) ."

The EIN of [REDACTED] Inc. should be entered in the upper right hand corner of the Form SS-10.

2. "[REDACTED] Inc. (EIN: [REDACTED]), common paymaster, for [REDACTED] Inc. (EIN: [REDACTED]) *."

In addition, at the bottom of the page, the following language should be added:

"*This consent is applicable for all returns filed for the quarter beginning April 1, [REDACTED]."

The EIN of [REDACTED], Inc. should be entered in the upper right hand corner of the Form SS-10.

[REDACTED]

We advise that two Forms SS-10 be executed for the [REDACTED] and [REDACTED] taxable years. The captions for the Forms SS-10 should read as follows:

1. "[REDACTED], Inc. (EIN: [REDACTED])."

The EIN of [REDACTED], Inc. should be entered in the upper right hand corner of the Form SS-10.

2. "[REDACTED] Inc. (EIN: [REDACTED]), common paymaster for [REDACTED] Inc. (EIN: [REDACTED])."

In addition, at the bottom of the page, the following language should be added:

"*This consent is applicable for all returns filed for the quarter beginning October 1, [REDACTED]."

The EIN of [REDACTED], Inc. should be entered in the upper right hand corner of the Form SS-10.

Procedural Considerations

Please note that Section 3461 of the I.R.S. Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service, each time that it requests a taxpayer to extend the limitations period, to advise the taxpayer of the right (i) to refuse to extend the statute of limitations on assessment, or, in the alternative, (ii) to limit an extension to particular issues or for specific periods of time. To satisfy this requirement, you should provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the consent. You should also document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the IRM requires use of Letter 907(DO) to solicit a Form SS-10, Letter 928(DO) as a follow-up letter to Letter 907(DO) (when appropriate), and Letter 929(DO) to transmit a copy of the executed consent to the taxpayer. See IRM Handbook No. 121.2.22.3 and No. 121.2.22.4.2. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Form SS-10 is received from the taxpayer, the

authorized manager should promptly sign and date it in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM, Handbook No. 121.2.22.5.10. The manager must also update the respective statute of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 121.2.22.5.11(1)(g). In the event a Form SS-10 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Should you have any questions regarding this matter, please contact Viviana Taverna of this office at (212) 436-1508.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROLAND BARRAL
Area Counsel, LMSB
(Financial Services)

By: _____
VIVIANA TAVERNA
Attorney (LMSB)